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20

21 **UNITED STATES DISTRICT COURT**
22 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
23

24 CORY SPENCER, an individual;
25 DIANA MILENA REED, an
individual; and COASTAL
26 PROTECTION RANGERS, INC., a
27 California non-profit public benefit
corporation,
28

CASE NO. 2:16-CV-02129-SJO (RAOx)

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF ITS REQUEST FOR
RECORDS FROM THE PERSONAL
DEVICES OF PALOS VERDES
ESTATES POLICE OFFICERS**

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Plaintiffs,

v.

LUNADA BAY BOYS; THE
INDIVIDUAL MEMBERS OF THE
LUNADA BAY BOYS, including but
not limited to SANG LEE, BRANT
BLAKEMAN, ALAN JOHNSTON
AKA JALIAN JOHNSTON,
MICHAEL RAE PAPAYANS,
ANGELO FERRARA, FRANK
FERRARA, CHARLIE FERRARA,
and N. F.; CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE JEFF
KEPLEY, in his representative
capacity; and DOES 1-10,

Defendants.

FILED CONCURRENTLY WITH
DECLARATION OF SAMANTHA
WOLFF

Complaint Filed: March 29, 2016
Trial Date: December 12, 2017

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1 **I. INTRODUCTION**

2 Few of Defendants' discovery responses came easy in this matter, with
3 Plaintiffs being forced to seek the Court's help at least 14 times. But Plaintiffs
4 trusted the City to play fair because in California, state law requires transparency in
5 government.¹ Further, courts have articulated higher ethical responsibilities for
6 public lawyers than for members of the private bar.² Here, Plaintiffs believed the
7 City would shoot straight as the records sought are obtainable by any member of the
8 public – not just parties to active litigation. Unfortunately, Plaintiffs learned late
9 that the City was negligent in responding to discovery at best, or had strained to
10 interpret its responses in an artificial manner.

11 It became clear in late July/early August 2017 that the City never intended to
12 comply with its discovery obligations.³ Although the City boasts of a large
13 production and claimed costs incurred, it dumped nonresponsive information from
14 noncritical personnel while failing to target known critical data sources. Indeed, the
15 City failed to search for relevant discovery at the outset, instead choosing to wait for
16 Plaintiffs to file a motion to compel.

17 Plaintiffs understood – based upon the City's responses to interrogatories –
18 that officers were not permitted to use personal devices for City business and did not
19 use their devices. Plaintiffs, however, discovered in late June and July 2017 – after
20 depositions and compelling the disclosure of a critical document – that officers do

21 _____
22 ¹ See, e.g., California's sunshine laws (the Ralph M. Brown Act, Gov't Code §§
23 54950 *et seq.*) and the California Public Records Act (Gov't Code §§ 6250 *et seq.*).

24 ² The heighten ethical responsibilities of government lawyers applies when a private
25 attorney is retained by a city. The special ethical duties require the public lawyer to
26 further justice and not merely to advance the articulated desires of the officers
27 embodying the entity in any particular matter. See, *People ex. rel Clancy v.*
28 *Superior Court* (1985) 39 Cal. 3d 740, 746; *City of Los Angeles v. Decker* (1977) 18
Cal. 3d 860, 871.

³ By example, after filing its summary judgment motion, the City produced over
2,900 items (documents, photographs, and videos), including important information
produced *after* Plaintiffs' reply brief was filed.

1 communicate and associate with Bay Boys, and that the City had known this for
2 over a year. Yet the City never searched, much less produced, any police officer's
3 personal cell phone records.

4 Oddly, the City asserts Plaintiffs should have discovered the City's
5 malfeasance sooner. But Plaintiffs diligently pursued discovery, as demonstrated
6 below, and must not be penalized for the City's utter disregard of its duties.

7 **II. FACTUAL BACKGROUND**

8 **A. Plaintiffs Reminded The City To Preserve ESI And Actively**
9 **Pursued Discovery From The City, Including Information Held By**
10 **Police Officers**

11 On June 8, 2016 Plaintiffs emailed counsel for the City a litigation hold letter.
12 (Wolff Decl., ¶ 3.) And, on August 5, 2016, during the Rule 26(f) meeting,
13 Plaintiffs reiterated the importance of preserving smart phone information. (*Id.* ¶ 4.)

14 On October 20, 2016, Plaintiffs served document requests on the City that
15 cover the information on its employees' personal devices. (Wolff Decl., ¶ 6.) After
16 this, while in hindsight the City started its stall, the Plaintiffs met and conferred to
17 obtain responsive records. Important dates include:

- 18 • **May 5, 2016:** The City hired an investigator who specializes in police
19 misconduct investigations to evaluate potential City employee misconduct in
20 leaking information that compromised the botched February 13, 2016
21 undercover operation into the "Bay Boys."⁴ This Report identified: (a) Bay
22 Boys Charles Mowat and Michael Thiel, (b) Captains Best and Velez as
23 being part of the inner circle in the planned investigation, (c) that Captain
24 Velez briefed the officers scheduled to work the operation, (d) Sergeant
25 Barber and Officer Ackert as being long-term employees who interface with
26 the Bay Boys, (d) that Detective Hellinga may have knowledge about who
27 leaked the information, and that former officer Delmont had a close
28 relationship with the Bay Boys and was dating Property Clerk Albao who
may have overheard information on the planned undercover operation.

27 ⁴ This report was released to Plaintiffs on June 13, 2017 after Plaintiffs sought the
28 Court's help. (Wolff Decl., ¶ 30.)

- 1 • **Oct. 20, 2016:** Plaintiffs serve document requests on the City seeking
2 documents relating to any Plaintiff or any Defendant (Nos. 1, 2); a January
3 20, 2014 Martin Luther King, Jr. surfing event at Lunada Bay (No. 19); the
4 Bay Boys (No. 21); the investigation into the source of the leak that
5 compromised an undercover operation at Lunada Bay (No. 30); and the
6 police department's efforts to address localism (No. 38).
- 7 • **Oct. 21, 2016:** The City writes to Plaintiffs regarding the scope of its ESI
8 collection.
- 9 • **Oct. 24, 2016:** Plaintiffs agree to a meet-and-confer call to discuss the scope
10 of discovery and remind the City of its obligation to identify custodians.
- 11 • **Nov. 4, 2016:** Plaintiffs and the City meet and confer and discuss the use of
12 personal mobile devices by city employees while acting in the course and
13 scope of their employment. The City states it is making efforts to address
14 voluntary preservation of those devices.
- 15 • **Nov. 7, 2016:** The City states it would not produce certain information
16 *without mentioning* personal devices of its police officers.
- 17 • **Nov. 8, 2016:** Plaintiffs write to the City regarding the scope of the City's
18 preservation of documents.
- 19 • **Nov. 10, 2016:** The City writes to Plaintiffs that it "is not in possession,
20 custody, or control of any personal devices of City police officers."
- 21 • **Nov. 18, 2016:** The City responds to Plaintiff Spencer's document requests.
- 22 • **Nov. 22, 2016:** Plaintiffs write to the City stating that they do not agree the
23 City was not in possession, custody, or control of employees' personal
24 devices and relevant information should be preserved and produced.
- 25 • **Dec. 29, 2016:** The City writes to Plaintiffs that it will not require police
26 officers to produce *or preserve* personal data and includes a Dec. 28, 2016
27 letter from the Palos Verdes Police Officers' Association's ("POA") counsel.
- 28 • **Feb. 17, 2017:** Plaintiffs serve interrogatories to the City asking whether City
officers use personal phones on duty.
- **March 6, 2017:** Plaintiffs and the City conferred over the outstanding
production. The City claimed the amount of responsive data was "daunting"
and again asked Plaintiffs for custodian names.
- **March 30, 2017:** The City responds to Plaintiffs' interrogatories, stating that
City policy prohibits use of a personal device for work, so no police officer
personal devices contain responsive information.

- 1 • **April 11, 2017 – June 2, 2017:** Plaintiffs and the City attempt to mediate
2 their dispute and generally slow discovery efforts.
- 3 • **May 12, 2017:** Plaintiffs provided the City with a list of search terms, which
4 the City agreed to run against its ESI. Plaintiffs also asked for the internal
5 investigation report into the botched Feb. 13, 2017 undercover operation.
- 6 • **May 30, 2017:** The City claimed that it was still evaluating privileges that
7 may apply to the year-old internal investigation and was awaiting the POA's
8 position on production of the investigation report. Plaintiffs responded the
9 City was obligated to produce the report irrespective of the POA's position.
- 10 • **May 31, 2017:** The City finally provides a privilege log in this matter,
11 identifying one document – the investigatory report.
- 12 • **June 5, 2017:** The City initiated a call regarding its planned motion for
13 summary judgment. Plaintiffs responded that the City was far behind in
14 providing responses to the Plaintiffs' discovery demands.
- 15 • **June 7, 2017:** Plaintiffs sent the City a letter about outstanding discovery.
- 16 • **June 8, 2017:** The Court holds a telephonic hearing regarding the City's
17 investigation report and ordered further briefing. (Doc. No. 246)
- 18 • **June 13, 2017:** The City produces the investigatory report which identifies
19 officers with a close relationship to the Bay Boys, including Sgt. Barber.
- 20 • **June 22, 2017:** Plaintiffs depose Sgt. Barber. The POA and City lawyers
21 instruct him not to answer questions about his cell phone number, data on his
22 phone, and whether he preserved data. He said he communicates with
23 Charles Mowat and Rick Delmont on his phone, both of whom are identified
24 in the investigatory report. He also said it is common for officers to use their
25 personal cell phones in the field. This deposition transcript became available
26 July 10, 2017, but not final until August 16, 2017.
- 27 • **June 23, 2017:** Plaintiffs depose City Police Service Officer Placek, who
28 identifies Sgt. Barber as knowing "a lot of the subjects that surf in the area."
- **July 12, 2017:** Plaintiffs depose 30(b)(6) Capt. Best, who states the police
department oversees 30 or 40 phones related to its Disaster District Program,
and confirmed that Defendant Blakeman used one such phone.
- **July 13, 2017:** Plaintiffs depose 30(b)(6) Anton Dahlerbruch (City
Manager) and Sheri Repp Loadman.
- **July 14, 2017:** City files its motion for summary judgment.
- **July 20, 2017:** Plaintiffs write to the City to demand a police operations plan

1 relating to a Martin Luther King Day 2014 or 2015 surfing event and police
2 videos and photographs from these events that were mentioned during PMK
3 Best's deposition but not previously produced.

- 4 • **July 25, 2017:** During a discovery hearing, Plaintiffs raised the issue of the
5 City's failure to comply with discovery obligations.
- 6 • **July 26, 2017:** During another discovery hearing, Plaintiffs requested a date
7 to file remaining discovery motions because evidence had been destroyed,
8 understanding a motion needed to be filed by August 7, 2017.
- 9 • **Aug. 3, 2017:** The City finally produces the police operations plan that Cpt.
10 Best prepared for the Martin Luther King Day 2014 surfing event, which was
11 identified by PMK Best during his deposition. Plaintiffs received this
12 document two weeks after demanding its production.⁵
- 13 • **Aug. 4, 2017:** The City produces video of the Martin Luther King Day 2014
14 event.
- 15 • **Aug. 7, 2017:** Plaintiffs filed motions to compel (Doc. Nos. 392 and 393),
16 which among other things sought photographs referenced in an incident
17 report, video from Lunada Bay Events, and police officer cell phone records.
- 18 • **Aug. 9, 2017:** The Court denied the motion to compel based on timeliness,
19 but noted Plaintiffs' FRCP 56(d) motion, if granted, could allow Plaintiffs
20 additional time to resolve discovery disputes.

21 (Wolff Decl., ¶¶ 2-43.)

22 Plaintiffs have acted diligently in pursuing the records of the police officers'
23 personal devices.

24 **III. ARGUMENT**

25 **A. Plaintiffs Diligently Pursued the Records At Issue**

26 Although Plaintiffs were informed on December 29, 2016 that the City would

27 ⁵ Counsel for the City represented to the Court that "the first time the report had
28 been identified" was during PMK Best's deposition. Counsel also stated that the
City "used the terms that the Plaintiffs have provided us to do searches
electronically." (Wolff Decl., ¶ 43, September 5, 2017 Reporter's Transcript, 27:13-
23.) But this report contains numerous responsive search terms, and documents
relating to the Martin Luther King Day 2014 surfing event were specifically
requested in discovery in October 2016. The City has never offered an explanation
why this document was not previously identified or produced. This document was
produced *after* Plaintiffs' reply to the City's summary judgment motion was due.

1 not require its officers to preserve or produce personal cell phone data, Plaintiffs did
2 not become aware that relevant information actually existed until the summer of
3 2017. Until that time, Plaintiffs had been laboring under the misapprehension that
4 the City would comply with its discovery obligations to investigate whether relevant
5 information existed, and produce it without being compelled to do so.

6 But slowly over the course of the summer months, Plaintiffs discovered the
7 City had withheld relevant evidence. Indeed, after initiating efforts to compel
8 production, the City belatedly produced the internal investigation report of the
9 botched February 13, 2016 undercover operation. The report, which was produced
10 to Plaintiffs on June 13, 2017 - exactly one year after its completion - provided
11 previously unknown links between officers and Bay Boys, including Sgt. Barber and
12 Officer Delmont. When Sgt. Barber was deposed approximately a week later, on
13 June 22, 2017, Plaintiffs learned that the City had *not* instructed him to preserve
14 relevant data on his cell phone and, when he was instructed by his attorney not to
15 answer whether he had deleted data from his cell phone, Plaintiffs were only left to
16 believe that he had indeed deleted such data. Plaintiffs also began to learn of Sgt.
17 Barber's friendships with the Bay Boys, tying in an "effective relationships"
18 comment made by Chief Kepley. (Wolff Decl., ¶ 5)

19 Plaintiffs continued to lose faith in the City's candor and intentions when,
20 around this same time, Plaintiffs discovered that the City repossessed Defendant
21 Blakeman's City-issued cell phone, though the City never informed Plaintiffs of this
22 fact. It was not until Plaintiffs demanded Blakeman's cell phone records and data
23 that the City finally produced the responsive information. And in August 2017, the
24 City produced a memorandum identified by Captain Best during his deposition that
25 related to City policing efforts at a Martin Luther King Day 2014 surfing event (only
26 after being prompted by Plaintiffs). Notably, this document was responsive to
27 Plaintiffs' discovery requests and contained relevant search terms that Plaintiffs
28 provided months earlier, yet it had not been produced or included in a privilege log.

1 These facts all led Plaintiffs to the realization that the City had ignored its
2 discovery obligations. Plaintiffs raised this issue at a July 25, 2017 telephonic
3 hearing, filed a motion to compel on August 7, 2017, and filed a motion for
4 administrative relief under FRCP 56(d). Plaintiffs continue to seek the production
5 of data from the police officers' personal devices that are responsive to Spencer's
6 document requests.


7 **B. The City Improperly Refused To Preserve And Produce Police**
8 **Officers' Personal Cell Phone Data**

9 The City is obligated to preserve and produce personal phone records of its
10 employees and cannot shield records from search or disclosure under the expedient
11 of storing them in a private account. *City of San Jose v. Superior Court*, 2 Cal.5th
12 608 (2017); *see also, Comm'n on Peace Officer Standards and Training v. Superior*
13 *Court*, 42 Cal.4th 278 (2007). Officer communication with the Bay Boys is a public
14 record. (Wolff Decl., ¶ 5) Further, the City's proffered solution – that Plaintiffs
15 subpoena all 35 officers' records directly – is not permissible under FRCP 45(c)(1).
16 Rather, the burden was the City's to identify the custodians and preserve and collect
17 any relevant data. The City may not shift this burden to Plaintiffs, particularly after
18 withholding evidence and denying its existence.

19 **IV. CONCLUSION**

20 The City may not shirk its discovery obligations by adopting a wait-and-see
21 approach, hoping Plaintiffs would not discover the City's malfeasance before the
22 close of discovery. Plaintiffs therefore request, at a minimum, that the Court order
23 the City to collect the records of its officers' personal devices and review responsive
24 records *in camera* for potential production.

25 DATED: September 21, 2017

26 HANSON BRIDGETT LLP
By: 
27 KURT A. FRANKLIN
28 Attorneys for Plaintiffs